

## CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Chelsea Yogerst	Team: Squad #12	CCRB Case #: 201607982	<input type="checkbox"/> Force	<input type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Friday, 09/16/2016 1:04 AM	Location of Incident: § 87(2)(b)	Precinct: 73	18 Mo. SOL 3/16/2018	EO SOL 3/16/2018	
Date/Time CV Reported Fri, 09/16/2016 4:20 PM	CV Reported At: CCRB	How CV Reported: Phone	Date/Time Received at CCRB Fri, 09/16/2016 4:20 PM		

Complainant/Victim	Type	Home Address
§ 87(2)(b)	§ 87(2)(b)	§ 87(2)(b)

Witness(es)	Home Address
§ 87(2)(b)	§ 87(2)(b)

Subject Officer(s)	Shield	TaxID	Command
1. POM Edwin Montanez	20443	955530	PSA 2
2. POM Jason Gammello	31832	954842	PSA 2
3. SGT Omar Birchwood	01886	945512	PSA 2

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. POM Luis Fernandez	22932	953854	PSA 2

Officer(s)	Allegation	Investigator Recommendation
A.SGT Omar Birchwood	Abuse: Sergeant Omar Birchwood authorized the entry of § 87(2)(b) in Brooklyn.	§ 87(2)(g), § 87(4-b)
B.SGT Omar Birchwood	Abuse: Sergeant Omar Birchwood authorized the search of § 87(2)(b) in Brooklyn.	§ 87(2)(g), § 87(4-b)
C.POM Edwin Montanez	Abuse: Police Officer Edwin Montanez threatened to arrest § 87(2)(b)	§ 87(2)(g), § 87(4-b)
D.POM Edwin Montanez	Abuse: Police Officer Edwin Montanez threatened § 87(2)(b) with the use of force.	§ 87(2)(g), § 87(4-b)
E.POM Jason Gammello	Abuse: Police Officer Jason Gammello threatened to arrest § 87(2)(b)	§ 87(2)(g), § 87(4-b)
F.POM Jason Gammello	Abuse: Police Officer Jason Gammello threatened § 87(2)(b) with the use of force.	§ 87(2)(g), § 87(4-b)
§ 87(2)(g), § 87(4-b)	§ 87(2)(b)	§ 87(2)(g), § 87(4-b)
§ 87(2)(g), § 87(4-b)	§ 87(2)(b)	§ 87(2)(g), § 87(4-b)

### Case Summary

On September 16, 2016, § 87(2)(b) filed a complaint with the CCRB telephone.

On September 16, 2016, at approximately 1:04 a.m., Sgt. Omar Birchwood, PO Edwin Montanez, PO Jason Gammello and PO Luis Fernandez, all of PSA-2, entered and searched § 87(2)(b)'s residence, located at § 87(2)(b) § 87(2)(b) in Brooklyn (**Allegations A and B**). PO Montanez and PO Gammello allegedly threatened § 87(2)(b) with arrest and the use of force (**Allegations C-F**). § 87(4-b), § 87(2)(g)



2016-11-29\_14-26-54.mp4

Surveillance video footage from the outside of § 87(2)(b) § 87(2)(b) in Brooklyn was provided by § 87(2)(b) and shows the officers outside of the apartment building. The footage does not capture any allegations.

### Mediation, Civil and Criminal Histories

- This case was suitable for mediation, but § 87(2)(b) rejected it.
- § 87(2)(b) did not file a Notice of Claim (03 BR).
- § 87(2)(c), § 87(2)(b)

### Civilian and Officers CCRB Histories

- § 87(2)(b)
- Sgt. Birchwood has been a member of the service for eight years and has eighteen allegations in five cases. Of these complaints, there are no substantiated allegations or allegations relevant to this incident. § 87(2)(g), § 87(4-b)
- PO Montanez has been a member of the service for three years and has zero allegations against him.
- PO Gammello has been a member of the service for three years and has zero allegations against him.

### Findings and Recommendations

#### Explanation of Subject Office Identification

Given that Sgt. Birchwood was the supervisor on scene when the officers entered and searched the apartment, **Allegation A** and **B** were pleaded against him.

## **Recommendations**

### **Allegation A-Abuse of Authority: Sergeant Omar Birchwood authorized the entry of § 87(2)(b) in Brooklyn.**

It is undisputed that officers entered § 87(2)(b) § 87(2)(b) in Brooklyn. § 87(2)(b) stated that when he heard PO Montanez and PO Gammello asking for § 87(2)(b) through the door, he assumed that they were looking for § 87(2)(b) so he introduced himself to the officers and asked them why they were there. PO Montanez informed § 87(2)(b) that they were actually looking for him. When § 87(2)(b) asked why, PO Montanez instructed him to put some pants on so that they could go inside to talk to him, otherwise, he would blurt out his business in the middle of the hallway and expose him in front of everyone. In response, § 87(2)(b) told the officers that he would rather them come inside and allowed them to enter into the apartment.

§ 87(2)(b) corroborated § 87(2)(b)'s testimony and stated that § 87(2)(b) let the officers into the apartment.

Sgt. Birchwood stated that prior to them responding to § 87(2)(b)'s residence, PO Gammello and PO Montanez performed a vehicle stop, during which time § 87(2)(b)'s cousin informed them that he believed § 87(2)(b) possessed a firearm because he had seen a photograph of it on Facebook. He then provided the officers with § 87(2)(b)'s name and his address. Sgt. Birchwood denied seeing the photograph of the firearm and did not recall if PO Gammello and PO Montanez saw the photograph. PO Montanez called Sgt. Birchwood on the phone and relayed the information that § 87(2)(b)'s cousin had provided to him. Sgt. Birchwood then ran § 87(2)(b)'s name through his Department phone, obtained his criminal history § 87(2)(b). He also confirmed § 87(2)(b)'s address and obtained a photograph of § 87(2)(b). Sgt. Birchwood denied that he took any additional steps to prove that the information that § 87(2)(b)'s cousin provided was true.

Immediately following the vehicle stop, Sgt. Birchwood, PO Fernandez, PO Gammello and PO Montanez responded to § 87(2)(b)'s apartment. Sgt. Birchwood denied that they conducted any surveillance or spoke to any neighbors prior to knocking on § 87(2)(b)'s door. He also denied that the officers said anything through the door while they were knocking. § 87(2)(b) answered the door almost immediately and Sgt. Birchwood recognized him from the photograph. § 87(2)(b) was calm and immediately invited the officers to enter his apartment because he preferred to speak to them inside. § 87(2)(b) also stepped to the side, which led Sgt. Birchwood to believe that he wanted them to enter. Sgt. Birchwood denied that the officers said anything to § 87(2)(b) or asked for permission to enter, prior to them inviting them in. Sgt. Birchwood denied that they told him that if he did not let them in that they would blurt out his business into the hallway. § 87(2)(b) did not object to the officers entering at any point and was never uncooperative. All four officers entered the apartment at approximately the same time.

PO Montanez and PO Gammello corroborated Sgt. Birchwood's testimony with the following exceptions. PO Montanez and PO Gammello testified that § 87(2)(b)'s cousin informed them that he had seen § 87(2)(b) with a firearm while he was speaking to him via Facetime. They denied that there was a photograph or screen shot of the firearm. Both officers also stated that when § 87(2)(b) opened the door, he invited them to enter his residence because he did not want them to "air his business into the hallway."

According to People v. Cosme, 48 N.Y.2d 286 (1979), the police may lawfully conduct a warrantless entry and search when they have obtained the voluntary consent of a party who possess the requisite degree of authority and control over the premises or personal property in question (04 BR).

As Sgt. Birchwood acknowledged that they did not have a warrant for § 87(2)(b) the propriety of the entry hinged upon whether consent was obtained. § 87(2)(b) had authority over his own apartment and stated that he gave the officers verbal permission to enter his apartment because he preferred to speak to them inside. § 87(2)(g)

§ 87(2)(b)

§ 87(2)(b)

§ 87(2)(b)

§ 87(2)(b)

§ 87(2)(b)

**Allegation B-Abuse of Authority: Sergeant Omar Birchwood authorized the search of § 87(2)(b) in Brooklyn.**

**Allegation C-Abuse of Authority: Police Officer Edwin Montanez threatened to arrest § 87(2)(b)**

**Allegation D-Abuse of Authority: Police Officer Edwin Montanez threatened § 87(2)(b) with the use of force.**

**Allegation E-Abuse of Authority: Police Officer Jason Gammello threatened to arrest § 87(2)(b)**

**Allegation F-Abuse of Authority: Police Officer Jason Gammello threatened § 87(2)(b) with the use of force.**

It is undisputed that officers searched § 87(2)(b) § 87(2)(b) in Brooklyn; however, the circumstances surrounding the search are disputed.

§ 87(2)(b) stated that once inside his apartment, the officers explained that they were there because they had a warrant for him, but were not going to arrest him. Instead, they only wanted to speak to him. § 87(2)(b) told the officers that he was confident that he did not have a warrant

§ 87(2)(b) When the officers asked § 87(2)(b) to explain § 87(2)(b)

§ 87(2)(e), § 87(2)(f), § 87(2)(b)

§ 87(2)(b)

§ 87(2)(b)

§ 87(2)(b)

§ 87(2)(b)

At the end of his discussion, the officers told § 87(2)(b) that because they had a warrant for him and he had § 87(2)(b), they were not going to leave without making sure that there were no guns in his residence. When § 87(2)(b) asked the officers why they had to search his residence, they responded by asking him if they would find any guns. § 87(2)(b) told the officers that they would not find guns, but asked again why they had to search his house. PO Montanez repeated that they had to search because of the warrant out for his arrest and to ensure that there were no guns. When § 87(2)(b) asked the officers what would happen if he did not consent to the search, PO Montanez and PO Gammello told him that they were the good guys and if he did not consent to the search, the bad cops would respond to his apartment, kick his door down, arrest him for his warrant and search the residence. The officers then said that if they did

not find any guns, they would “take care of the warrant” and he would be free to go. § 87(2)(b) did not know what the officers meant, but agreed to let them search because he did not know if they really had a warrant.

§ 87(2)(b) remained in the living room while the officers searched every room in his residence including the bedroom, kitchen, hallway and bathroom. The officers looked in drawers, § 87(2)(b)'s pocketbooks, the bins in the hallway and through articles of clothing. Once the search was complete, PO Gammello asked PO Montanez what they should do because there was nothing there. PO Gammello told § 87(2)(b) that he was “good to go” and instructed him to sign and write his address on a piece of paper. Given that § 87(2)(b) was anxious and tired, he signed the paper without paying attention to what was on it.

§ 87(2)(b) did not recall § 87(2)(b) telling the officers they could search his residence, but stated that he threw his hands into the air as to indicate that the officers should just go ahead and search the apartment.

Sgt. Birchwood testified that once inside the apartment, PO Montanez explained to § 87(2)(b) that they had received information that he possibly possessed a firearm. PO Montanez then asked § 87(2)(b) if he would be willing to allow them to search his residence to see if he had any firearms. § 87(2)(b) was not upset and did not question where the officers had received this information. PO Montanez explained to § 87(2)(b) that he could fill out a consent to search form, which would give them permission to search his apartment. PO Montanez also advised § 87(2)(b) of his right to refuse the search. In response, § 87(2)(b) immediately told the officers that he had no problem with them searching and signed the consent to search form. Sgt. Birchwood denied that § 87(2)(b) ever objected to a search of his residence and denied that he asked the officers if he had to sign the form.

Sgt. Birchwood denied that the officers told § 87(2)(b) that if he did not allow them to search, that bad cops would respond to the apartment, kick the door down, and arrest him. He denied that the officers told § 87(2)(b) that they were not going to leave until they checked his residence for firearms. Sgt. Birchwood also denied that officers threatened to arrest § 87(2)(b) and denied that § 87(2)(b) was told that his door would be damaged if he did not allow them to search. In addition, Sgt. Birchwood denied that the officers told § 87(2)(b) that they had a warrant for him and denied that the officers asked him if he served time for possession of a gun or discussed his parole. Sgt. Birchwood did not recall any discussion regarding a warrant or § 87(2)(b)'s criminal history.

Once § 87(2)(b) signed the consent to search form, PO Gammello and PO Montanez searched § 87(2)(b)'s bedroom because they have found in their experience that they are typically kept there. The officers searched around the bed and in the dresser drawers specifically. § 87(2)(b) did not object to the search at any point. The officers did not recover anything during their search. Once PO Gammello and PO Montanez searched the bedroom for approximately fifteen minutes, Sgt. Birchwood informed the officers that it was not necessary to search the remainder of § 87(2)(b)'s residence and they left. He did not recall officers searching anywhere else in § 87(2)(b)'s apartment. Sgt. Birchwood ended the search at this time because he had a feeling that there were no firearms in the apartment given that § 87(2)(b) was being so cooperative. Sgt. Birchwood denied that he observed anything about § 87(2)(b) or his apartment that led him to believe that there was a firearm.

PO Montanez and PO Gammello corroborated Sgt. Birchwood's testimony with the following exceptions. PO Montanez denied that § 87(2)(b) was informed that he could refuse to sign the consent to search form and denied that he advised § 87(2)(b) of his right to refuse the

search. He denied that § 87(2)(b) ever asked the officers if he had to allow them to search his residence. Both PO Montanez and PO Gammello testified that § 87(2)(b) told the officers that he did not have any firearms. PO Gammello added that § 87(2)(b) told the officers that they could check his apartment to see that he did not have any firearms. PO Gammello initially denied that he searched anywhere else in the apartment, but later sated that he looked in the cabinets in the kitchen.

According to People v. Cosme, 48 N.Y.2d 286 (1979), the police may lawfully conduct a warrantless entry and search when they have obtained the voluntary consent of a party who possess the requisite degree of authority and control over the premises or personal property in question (04 BR). People v. Gonzalez, 39 N.Y.2d 122 (1976) states that the factors to consider in determining the voluntariness of the individual's consent are whether the individual (1) was in custody or under arrest; (2) was confronted by police or law enforcement officials; (3) had been evasive or uncooperative; and (4) was advised of the right to refuse (07 BR). According to People v. Poinvil NY Slip OP 25102 (2015), consent is voluntary when it is a true act of the will, an unequivocal product of an essentially free and unconstrained choice (06 BR).

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g), § 87(4-b)

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Squad: 12

Investigator: \_\_\_\_\_ Chelsea Yogerst \_\_\_\_\_  
Signature Print Date

Squad Leader: \_\_\_\_\_  
Title/Signature Print Date